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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,
Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

REPLY BRIEF FOR RESPONDENTS.

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Respondents desire not to overburden this Court, and therefore file this reply brief with reluctance. But some of the assertions and arguments in petitioners' reply brief require brief comment.

This Court can easily determine whether petitioners or respondents have stated the record facts accurately. Petitioners claim that what respondents have characterized as misstatements on petitioners' part are fair inferences from the record. We suggest to the Court that it refer specifically to the contract of April 9, 1935, and the allegations concerning the same. (R. 22-28.) If the inference can be drawn therefrom that Odell's compensation was not to be paid to him by the bankrupt out of its contingent compensation of $20,000 and that Odell was to be paid an additional fee by the individual contractors—which is the inference

which apparently is the sole basis for petitioners' refusal to turn over to respondents their money—then we admit that we have totally misread and misunderstood the contract of April 9, 1935. We submit that the contract is explicit and clear on at least two points: (1) no compensation (other than the $1,500 retainer which was paid) was to be paid to the bankrupt unless the contractors were held *exempt* from the Illinois Sales Tax; (2) for the purpose of accomplishing the aims of the contract an attorney was needed, as the bankrupt, a corporation, could not practice law and, therefore, Odell, an attorney, was retained by the bankrupt for the contractors but without expense to the contractors; that Odell, although in name the attorney for the contractors in the litigation, was, in fact, acting as the agent of the bankrupt in order to enable it to perform its contract.

Odell was selected by the bankrupt, not by the contractors. (R. 25.) In acting as a custodian of the Escrow Fund, which was explicitly provided for in the contract itself, Odell was continuing to act in his capacity as agent of the bankrupt. As the Court of Appeals said:

> "The escrow provision was a part of the agreement between appellees and the alleged bankrupt. The bankrupt, under the agreement, was to employ Odell to conduct the litigation regarding the validity of the tax. For that purpose, under the agreement, he plainly was the agent of the bankrupt." (R. 132.)

If petitioners' statements are fair inferences from the record, it is inconceivable how they could make such different statements of the facts in their petition for certiorari (p. 2) and in their main brief (pp. 2-3).

Petitioners are not accurate when they state that the only allegation in respondents' petition concerning the fact that Odell and Harris were the agents of the bankrupt is that part of the petition quoted on page 3 of their reply brief. Numerous other allegations of the petition relating in detail

the relationship of the parties, the purpose and method of setting up the Escrow Fund and the payment of respondents' taxes (R. 22-28, 30, 33-34) show that Odell and Harris were acting throughout merely as agents of the bankrupt. Attention is called to the opinion of the Court of Appeals on this question; (R. 132) in quoting therefrom in their original brief (p. 13), petitioners omitted from the body of the part of the opinion quoted significant and vital parts thereof.

The contract of April 9, 1935, provided that, if the contractors were held exempt from the Sales Tax, the bankrupt was to receive additional compensation in an amount equal to the calculated net savings to the contractors for the three calendar months next preceding said saving, but, in no event, in excess of $20,000. (R. 23.) If the *Blome* case had decided that the contractors were exempt from the tax, the $315,000 they had in the Escrow Fund would have been saved. The escrow period covered 24 months (from April, 1935, to April, 1937) and, if the average be taken, the last three months' savings would have been one-eighth of $315,000, or approximately $39,000. By the contract, however, the contingent fee to be paid by the contractors was limited to $20,000. There was *no* provision in the contract for payment to the bankrupt of any additional compensation if the Court should hold the contractors liable to the tax but to a less tax than they were paying. Actually, nothing in *Blome, et al.* v. *Ames, et al.*, 365 Ill. 456, reduced the liability of the contractors. The only thing decided in the contractors' favor in that opinion was that the Director of Finance "was without power to control the appellants' (the contractors') method of billing to or the form of their contracts with owners". Most decidedly, $72,000 was not saved to the contractors by the decision in the *Blome* case. (R. 40.) But, assume that it was. If $72,000 was saved to all the contractors in the Escrow Fund and $68,500 was saved to re-

spondents for 24 months' taxes, then the average savings for the last three months to respondents was approximately $8,600. By the order of July 12, 1937, here appealed from, $48,580 was ordered distributed to respondents and $20,000 of respondents' money was reserved, subject to all claims of anybody making a claim. This $20,000 was the limit of respondents' liability to the bankrupt and Odell, had respondents been held exempt from the Sales Tax. Therefore, assuming, for the purpose of discussion, the truth of all the assertions made by petitioners regarding Odell's "successful efforts", how can petitioners, for allegedly saving respondents $68,580, possibly assert or have any claim against the excess over the $20,000, which excess was the only part distributed by the order of July 12, 1937.

Petitioners' assertion that respondents abandoned their claim to the books and records in the agreed order is not correct. In fact, it is just contrary to the record. The order provided that, after a checking by Odell and the attorney for respondents, "if there be any differences between the figures furnished by petitioners and the figures in the hands of Odell, said differences be determined by this court" (R. 41), which meant that the Court took jurisdiction over, and control and custody of, the books and records for any necessary purpose.

The statement of petitioners (their reply brief, p. 7) is interesting. Petitioners assert that respondents contend for a construction of the contract of April 9, 1935, under which Odell was to work gratuitously, even if successful. Respondents never contended for such a construction; they have merely contended, and now contend that the contract should be construed to mean what it says and not to mean just the opposite of what it says. The contract was between respondents and the bankrupt, and agreed to by Odell. What Odell did agree to was that, if the litigation for the contractors was successful in having the contractors

held exempt from the Sales Tax, the bankrupt was to get $20,000, and, if the litigation was not successful in having the contractors held exempt from the tax, the bankrupt was to get nothing, and that in any event Odell was to receive nothing from the contractors. Whatever Odell was to be paid, he was to receive from the bankrupt. Respondents alleged in their original petition (R. 26):

> "They are informed and believe and, upon such information and belief, charge the fact to be that said Odell received part of the aforesaid $1,500 paid to the Tax Service Association of Illinois, and had an agreement with said Tax Service Association that he would receive part of the further amount to be paid to the Tax Service Association of Illinois under the terms of said agreement of April 9, 1935, in case a favorable decision exempting the contractors from said tax was obtained." (R. 26.)

Odell having made an agreement by which he was to be paid by the bankrupt out of its contingent compensation is now taking a position directly contrary to the terms of his agreement. And it is apparent that his position, directly contrary to the terms of his agreement, is the sole basis for his refusal to comply with the order of July 12, 1937, and for this appeal. His position, tersely stated, is (1) although the arrangement made by the contractors was one that they pay compensation to the bankrupt (from which Odell was to receive his fees) contingent upon the contractors' being held exempt from the tax, the contractors must pay compensation even though the contingency never happened; (2) although the contract provided that whatever was to be paid by the contractors was to be paid to the bankrupt, not to Odell, and Odell agreed to that arrangement, he (Odell) is now entitled to compensation even though the bankrupt is not; and (3) although the bankrupt was to get a maximum of $20,000 if the respondents were held *exempt* from the Sales Tax, and although they were not held exempt from the tax, yet the compensation owing by the respondents exceeds $20,000.

Petitioners' Points I (1) and (2).

Respondents pointed out in their brief that Odell and Harris never alleged any facts in their pleas of lack of jurisdiction of the Court; that their pleas (R. 54-55) were actually based entirely upon the contention that so long as the bankrupt's motion to quash service upon it was pending, the Court had no jurisdiction; that this motion of the bankrupt to quash service was overruled before the orders here complained of were entered; (R. 76) that, therefore, petitioners' present contentions concerning the Court's lack of jurisdiction were raised in the Court of Appeals for the first time. Petitioners have not denied the above statements of fact nor have they attempted to explain why, in view of said facts, petitioners' points about jurisdiction, upon which their appeal is predicated, should be entitled to any consideration.

Simply for the purpose of illuminating the method of argument petitioners have pursued throughout their briefs, reference is made to their comments on *Nixon* v. *Michaels*, 38 F. (2d) 420. (Their reply brief, p. 8.) In respondents' brief (pp. 39-40) respondents distinguished the *Nixon* case from the instant case on four distinct grounds, one of which was "the bankruptcy estate was closed and the property which was the subject matter of the bankruptcy was in the possession of a total stranger". Petitioners, in their reply brief, in endeavoring to show that respondents' comments distinguishing the *Nixon* case were not sound, state two of the four grounds of distinction made by respondents, and omit two, including the main one just quoted. For further illustration of petitioners' method: in attempting to distinguish the cases cited by respondents on the subject of consent, petitioners say (their reply brief, p. 19) that the cases respondents cited "are cases in which the very orders consented to were appealed from. Not so in case at bar."

The leading case cited by respondents, *McGowan* v. *Parish*, 237 U. S. 287; 59 L. Ed. 955 (respondents' brief, p. 49), was one very similar to the instant case, where the order consented to was *not* the order appealed from. And petitioners' alleged distinction is similarly not sound as applied to *Page* v. *Arkansas Natural Gas Corp.*, 53 F. (2d) 27, affirmed 286 U. S. 269, 76 L. Ed. 1096, or to *Bachman* v. *McCluer*, 63 F. (2d) 580, 583, also cited by respondents.

Petitioners are in error in their idea that Section 2 (7) has no connection with the jurisdiction of a bankruptcy court over reclamation suits. It is the fact that some cases say that when property is in the actual possession of the bankruptcy court it has inherent jurisdiction, irrespective of the bankruptcy statute, to dispose of it. By reason also of Section 2 (7) a bankruptcy court has jurisdiction of all property in the possession, custody or control of the bankrupt or its agent at the time the petition is filed. That is not merely actual possession, but is possession, actual or constructive, or custody or control. Therefore, under this section of the bankruptcy statute the Court has jurisdiction of a reclamation suit by which it determines whether any property in *custodia legis* is the property of a third person or of the bankrupt. See the discussion in

Page v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27, affirmed 286 U. S. 269, 76 L. Ed. 1096,

which deals with (p. 33) the case of *Murphy* v. *Hofman*, 211 U. S. 562; 53 L. Ed. 327, relied upon by petitioners as the basis of their claim that only actual physical possession is the basis of a reclamation suit, and follows with a discussion of the law as stated above.

Petitioners' Point I (4).

For emphasis, petitioners have repeated in their reply brief the same assertions made in their original brief, namely, that the Escrow Fund was not in the control of the bankrupt or its agent, because Craig was not its agent, and that an agent must hold the property unconditionally subject to the sole order of the bankrupt. Petitioners again cite the same two cases in support of their assertion. We respectfully request the Court to examine those two cases. Neither, we submit, supports the proposition for which petitioners are contending in the instant case.

In one of the cases, *Buss* v. *Long Island Storage Warehouse Co.*, 64 F. (2d) 338, the trustee of the bankrupt K. attempted to charge defendant warehouse company with the value of goods it had delivered to one C. after bankruptcy against K. The trustee claimed that the defendant warehouse was, at the time of the petition in bankruptcy against K., the bailee of K. and, therefore, that the goods were in *custodia legis* and the defendant wrongfully turned them over to C. The defendant warehouse company claimed that the Court had no jurisdiction. The question was decided upon the facts that at the time the petition against K. was filed the defendant was not the bailee of K., that the bankrupt K. or his receiver in bankruptcy had never asserted a right against the defendant which would have made K. the bailor and the defendant the bailee, and that, under the facts, the defendant had the right to turn the goods over to C. because the defendant was not the bailee of the bankrupt.

In the other case cited by petitioners, *Sproul* v. *Levin*, 88 F. (2d) 866, the facts came out during the hearing of the evidence on a motion of the bankrupt K. for release from imprisonment. These facts showed that before the petition in bankruptcy was filed K. had drawn in cash

some money from a bank, which he gave to his wife in payment of some alleged loans, which the wife later gave to her sister in alleged payment of the sister's interest in the loans to K., and that afterwards the sister turned the money over to appellant as bailee. The appellant, who had no interest in the funds, was summarily ordered to turn this money over to K.'s trustee. The court held that this could not be done because the entire record in the case was merely the evidence in another proceeding in which appellant was a witness and to which he was not a party; that the person who actually claimed the money, namely, the sister, was also not a party to the proceedings and had no chance to defend her interest, and that the evidence showed, if anything, that the appellant was a bailee for the sister and not for the bankrupt.

Upon the question of exclusive control and bailment about which so much has been said by petitioners, we refer the Court to the case of

In re Goldman, 5 F. Supp. 973,

inadvertently omitted from respondents' main brief. So far as this particular question is concerned, the facts are quite similar to those in the instant case. G. and O. had a dispute which was settled by an agreement between G. and O., one of the terms of which was that certain Television stock was placed in the possession of R. as escrowee, to deliver to G. at the end of one year under certain conditions. G. was declared bankrupt and T. was appointed his trustee. O. filed suit in the state court against G. and R., claiming that the entire settlement by which the stock was placed in R.'s possession for G. was void and that O. was entitled to delivery of the stock from R. T. made a motion in the bankruptcy court to restrain O. from proceeding in the state court and to require R. to deliver the stock to T. T.'s motion was sustained. The court held that the

stock held by R. as escrowee was in the constructive possession of the court and that it had exclusive jurisdiction, and if the stock belonged to O. and not to G. or T., O. would have to make his claim to the stock in the bankruptcy court.

We request the Court first to read the last paragraph on page 14 of petitioners' reply brief which, in substance, claims that the cases cited on page 44 of respondents' brief do not sustain the proposition that an undisputed account in a bank is property subject to constructive possession of a court, and then to examine the cases cited by respondents. In view of the definiteness and certainty of those decisions, how petitioners can baldly assert to this Court that the funds here in question were of such character that they could not come into the custody or possession of the bankruptcy court,—respondents are unable to comprehend.

Petitioners' Point I (6).

Whether petitioners were "trustees", as they claim, or agents or stakeholders, the respondents were the beneficiaries of the Escrow Fund. Those beneficiaries had demanded of the "trustees" or stakeholders that their money in the Escrow Fund be turned over to them. Craig, one of the stakeholders, was willing and eager to turn the money over. The others, Harris and Odell, were not. Who were Odell and Harris protecting when they refused to turn the money belonging to their beneficiaries over to the beneficiaries? In what way, except by a failure of Odell and Harris to perform their duties to their beneficiaries, were the beneficiaries liable to lose any money? Because the bankrupt and its agents, Odell and Harris, had refused, before the bankruptcy petition was filed, to perform their duties to the beneficiaries of the

Escrow Fund, and for no other reason, this litigation was instituted. Petitioners, by their violation of their simple duty to these respondents, had compelled respondents to file their petition, which never should have been necessary. Even though the petition had been filed, yet if the funds were not released by June 1, 1937, petitioners might be personally liable for large sums on account of penalties that might be imposed upon respondents. This was the situation which created the "duress" of which petitioners complain. Duress? By petitioners' own assertions in their brief they show that they were as eager for the District Court to take jurisdiction and to act as were respondents. By petitioners' consent to the agreed order of May 27th they asked the Court to act and then, having asked the Court to act and having themselves acted pursuant to the Court's order, they say to the Court, "We didn't consent. We were forced to consent. You have no jurisdiction to do what we agreed you had jurisdiction to do and should do." And this position is the basis of petitioners' appeal.

Petitioners say it was at all times agreed that the question of the jurisdiction of the Court over the balance of the Escrow Fund was reserved. Under what theory did or could petitioners consent and agree that the Court had jurisdiction over an entire fund and at the same time reserve the right to question the Court's jurisdiction over one-fourth thereof? Under what kind of reasoning can petitioners agree to an order which specifically said the Court had jurisdiction over the balance remaining in the Fund and the Court should distribute it, and at the same time claim that they reserved the right to question the jurisdiction of the Court over said balance? If it was agreed by the parties that petitioners reserved the right to question the jurisdiction of the Court over the balance of the Fund, or if petitioners intended to reserve the

right to question that jurisdiction, why did not petitioners insert in the agreed order that the question of jurisdiction of the Court over the balance of the Fund was reserved? Why did the order provide just the contrary?

Conclusion.

We respectfully submit that there is no substantial question raised by this appeal; that the orders of the District Court appealed from and the orders of the United States Circuit Court of Appeals affirming with costs said orders of the District Court and ordering that petitioners pay to respondents interest on $48,580.40 from July 12, 1937, until said sum is paid, should be affirmed; and that this Court should also enter an order assessing against petitioners damages in the sum of 10 per cent of $48,580.40 in accordance with Rule 30 of this Court.

Respectfully submitted,

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Attorney for Dahl-Stedman Co., et al., Respondents.